

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002038-MR

JAMES TODD and his wife,
TINA TODD

APPELLANTS

v. APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 00-CI-00279

KENTUCKY HEARTLAND MORTGAGE, INC.

APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING IN PART AND REMANDING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

BAKER, JUDGE: James and Tina Todd (collectively referred to as "the Todds") appeal an August 30, 2002, Order from the Webster Circuit Court that granted summary judgment to Kentucky Heartland Mortgage, Inc. ("Heartland") and dismissed Heartland from the action with prejudice. We affirm in part, and reverse and remand in part.

The Todds were in need of repairs to their home. In order to secure financing for the repairs, the Todds contacted Heartland. Heartland successfully arranged for a loan; however, the Todds were allegedly told that the contractor had to be "bonded" in order to obtain the financing. Upon the purported recommendation of Bryan Anderson ("Anderson"), a representative of Heartland, the Todds hired Earlie Rupert, d/b/a R & W Construction (collectively referred to as "Rupert") to carry out the repairs.

On December 28, 2000, the Todds filed a Complaint in the Webster Circuit Court. Therein, it was alleged that Rupert failed to make the contracted repairs to the Todds' home in a workmanlike manner. The Todds also alleged that Heartland "unfairly and falsely mislead and deceived [them] by refusing process (sic) their loan if [they] picked a repairman of their choice and specically (sic) told them to use the Defendant, R & W Construction." Additionally, the Todds claimed that Heartland and Rupert conspired with one another "in furtherance of their actions," and that the actions of both parties were in violation of the Consumer Protection Act.

Heartland filed a motion for summary judgment. On August 30, 2002, the Webster Circuit Court entered an Order granting this motion and dismissing Heartland from the case with prejudice. This appeal follows.

The Todds argue that the circuit court erred by entering summary judgment. In particular, the Todds assert that there are material issues of fact that preclude summary judgment.¹

It is well established that summary judgment is proper when there are no "genuine issue[s] of material fact," and the movant is entitled to a judgment as a matter of law. Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 481, 483 (1991). Since summary judgment is to be "cautiously applied," the Court views the record "in a light most favorable to the party opposing the motion for summary judgment." Id. at 480. We, therefore, view the facts of this case in a light most favorable to the Todds. Viewing the facts as such, we believe that the circuit court properly granted summary judgment upon the claims of breach of contract, breach of fiduciary duty, bad faith, and violation of the Consumer Protection Act. We do not, however, believe that summary judgment was properly entered on the claim of fraud.

¹ We note that, on appeal, the Todds assert that Heartland's motion for summary judgment failed to address their claims for breach of contract, fraud, deceit, misrepresentation, bad faith, and breach of fiduciary duty. However, this same assertion was made by the Todds in the Plaintiff's Response to Defendant's Motion for Summary Judgment. In its reply to the Todds' response, Heartland claimed that the Todds neglected to raise any of these causes of action in their initial Complaint. Since these issues were raised prior to the Webster Circuit Court's Order, the grant of summary judgment encompassed all alleged claims brought by the Todds, including those addressed in their response and in Heartland's reply.

We look first to the claims of breach of contract, breach of fiduciary duty, and bad faith. It is well recognized that the Kentucky Rules of Civil Procedure (CR) require that a pleading put the opposing party on fair notice. See Cincinnati, Newport and Covington Transportation Co. v. Fischer, Ky., 357 S.W.2d 870 (1962). For a complaint to be deemed sufficient, “[o]nly a concise statement of facts is required.” CR 8.01; Pike v. George, Ky., 434 S.W.2d 626, 627 (1968). Likewise, to state a claim for relief, a “complaint need only give fair notice of a cause of action and the relief sought.” Security Trust Co. v. Dabney, Ky., 372 S.W.2d 401, 407 (1963).

The Todds assert their complaint gave Heartland adequate notice of their claims for breach of contract, breach of fiduciary duty, and bad faith. We disagree. Rather, we believe their complaint failed entirely to mention any claim against Heartland for breach of contract, breach of fiduciary duty, or bad faith. In fact, there is absolutely nothing in the Todds’ complaint that could possibly have put Heartland on fair notice that these claims were pending. We are, therefore, of the opinion that summary judgment was properly entered on the claims of breach of contract, breach of fiduciary duty, and bad faith.

The Todds also argue that summary judgment was improperly entered upon their claim for fraud. We agree. CR

9.02 states that, "in all averments for fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In Philpot v. Stacy, Ky., 371 S.W.2d 11, 13 (1962), the Court held that "fraud must be pleaded and clearly proved." However, CR 9.02 "is to be considered in light of the entire spirit of modern pleading which lays emphasis upon short, concise and direct pleading." Scott v. Farmers State Bank, Ky., 410 S.W.2d 717, 722 (1966).

In Conrad Chevrolet, Inc. v. Rood, Ky., 862 S.W.2d 312 (1993), the Court held that appellant's claim that appellee had "'used and abused the trust and confidence' reposed in her by appellant" was stated with sufficient particularity to state a claim for fraud and to satisfy the requirements of CR 9.02.

Like the allegation put forth in Conrad, we believe that the Todds' claim for fraud was stated with enough particularity to pass muster under CR 9.02. While we do agree that the complaint is inartfully drawn and that its draftsmanship leaves abundant room for improvement, the assertion that Heartland "unfairly and falsely mislead and deceived them" is stated with sufficient specificity to have put Heartland on notice that the Todds were alleging fraudulent behavior.

We also believe that, viewing the facts most favorable to the Todds, there are material issues of fact to preclude

summary judgment upon the claim of fraud. To bring an action for fraud in Kentucky, "the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury." United Parcel Service Co. v. Rickert, Ky., 996 S.W.2d 464, 468 (1999).

The Todds claim they wanted to employ James Todd's brother, Ricky Terry ("Terry"), to repair their home. Anderson, however, allegedly stated that the bank issuing the loan required homeowners to hire a "bonded" contractor; since Terry was not bonded, the Todds were unable to hire him. After hiring Rupert, the Todds learned from the lender that there was no such requirement. It was also later discovered that Rupert, who Anderson had allegedly recommended to the Todds, was not bonded.

Viewing these facts in a light most favorable to the Todds, we believe there exists a general issue of material fact upon whether Anderson misled the Todds regarding the requirements for securing a loan. Therefore, the circuit court's decision to grant summary judgment upon this claim was erroneous.

Finally, the Todds argue that the circuit court improperly granted summary judgment on their claim that

Heartland violated the Consumer Protection Act. In Craig v. Keene, Ky. App., 32 S.W.3d 90, 91 (2000), this Court established that the Kentucky Consumer Protection Act does not apply to "real estate transactions by an individual homeowner." We interpret the term "real estate transaction" to encompass any transaction involving or touching upon real estate. The loan the Todds obtained from Heartland was for the purpose of obtaining a mortgage loan on their home; thus, we hold that the Kentucky Consumer Protection Act is not applicable because this is a real estate transaction by an individual homeowner. Accordingly, the circuit court properly granted summary judgment upon the Consumer Protection Act claim.

For the foregoing reasons, the Order of the Webster Circuit Court is affirmed in part and reversed in part, and this cause is remanded for proceedings consistent with this opinion.

EMBERTON, CHIEF JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the Majority Opinion on all issues except the claim for a violation of the Consumer Protection Act. I believe the Majority has misapplied this Court's holding in Craig, supra. The claim in the case sub judice arises out of a loan transaction not the purchase of real estate. I believe

such a loan transaction constitutes a service under KRS
367.220(1).

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